IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1037 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT
Versus
THAKORE UDAJI GAGAJI & ANR

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Appearance :
MR IM PANDYA APP for Appellant
None for Opponent No.1
MR PREMAL S RACHH for Opponent No. 2

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 24/04/2007

ORAL JUDGMENT : **(Per : HONOURABLE MR.JUSTICE J.R.VORA)**

1 This Criminal Appeal is preferred by the State under Section 378 of the Code of Criminal Procedure against the judgment and order delivered by Assistant Sessions Judge, Patan, on 21st of December, 2004, in Sessions Case No. 376 of 2002, whereby all the accused of the said Sessions Case, came to be acquitted by the Trial Court for the offences punishable under Sections 307, 323, 504 and 34 of the Indian Penal Code as well as under Section 34 of the Bombay Police Act.

2 As per the prosecution case, the incident in question occurred on 28th of August, 1999 at 7.00 p.m. A complaint is preferred by Shaileshkumar Babulal Patel on the same day of the incident at about 23.00 hours at Patan Hospital. Accordingly, on that day, complainant Shaileshkumar Babulal Patel and his brother Kamleshbhai had been to their agricultural land for the purpose of agricultural work at village Kimbuva, from there, both of them were returning to village Kimbuva on bullet motorcycle. The bullet motorcycle was driven by Kamleshbhai and complainant was a pillion rider. When their vehicle reached near pucca road from the field, accused No.1 Udaji and other two persons, in all three persons, were noticed by them standing on the road. They stopped the motorcycle, and all the three persons started giving abuses to Kamelshbhai and Shaileshbhai. Accused No.1

Udaji Gagaji had a dharia with him and gave one blow on the forehead of complainant Shaileshbhai. The other two persons had also dharias with them. According to the complainant, though both the other persons were from their village, at that time, he did not know the names of those persons. Brother of the complainant Kamleshbhai brought the injured complainant at Patan Hospital, and there he offered his complaint to ASI, which was registered as Patan Taluka Police Station Crime Register No. 164 of 1999. The offence was thereafter investigated by three Investigating Officers, accused were arrested, and a charge sheet was submitted for the aforesaid offences against both the accused in the Court of learned Magistrate who, in turn, committed the case to the Court of Sessions, and the same was registered as Sessions Case No. 376 of 2002.

3 Learned Trial Judge framed the charges against both the accused for the above said offences vide Exhibit-7 on 13th of August, 2004 and both the accused pleaded not guilty and, hence, the prosecution examined as many as 15 witnesses and produced on record voluminous documents to prove its case.

4 At this stage, first, it is necessary to scrutinize the evidence as recorded by the Trial Court.

5 PW-1 Rughnatbhai Mulchandbhai Patel is examined at Exhibit-14 and is a panch of panchnama Exhibit -16 in respect of scene of offence. It is the prosecution case that scene of offence was shown by injured Patel Kamleshbhai Babulal, but this witness has not supported the panchnama and has been declared hostile. PW-2 Kantibhai Manorbhai Patel, Exhibit-15, is second panch of Panchnama at Exhibit-15 of scene of offence and he has also not supported the prosecution case. PW-3 Mohanbhai Jivabhai Patel is examined at Exhibit-17, is also a panch of panchnama, by which motorcycle was seen by panchas, which is placed on record at Exhibit-18. However, PW-3 Mohanbhai Jivabhai Patel, Exhibit-17, has not supported the panchnama at Exhibit-18 and, therefore, he was declared hostile by the prosecution. PW-4 Shivabhai Amichand Patel is examined at Exhibit-19 and he is also a second panch of panchnama at Exhibit-18 and he has also not supported the prosecution case. PW-5 Sureshbhai Ramjibhai Patel is examined at Exhibit – 20 is panch of panchnama at Exhibit-21 in respect of discovery of dharia from accused No.1. According to prosecution case, a preliminary panchnama was drawn because accused No.1 expressed his wish to discover dharia and thereafter he led police and panchas towards village Shithol and from the back of the houses of Thakore, in one culvert jeep was stopped, and from one field, Udaji – accused No.1 took out a dharia

from a roof of a house, which was seized. However, panch Sureshbhai Rameshbhai Patel did not support the prosecution case and stated that police obtained his signature on panchnama at Exhibit-21 at the police station and except that he did not know anything. He was declared hostile and was confronted with the panchnama at Exhibit – 21. PW-6 Meruji Paragji Rajput is examined at Exhibit-22 and he is also a panch of panchnama at Exhibit-23 in respect of discovery of dharia by accused No.2 from the field of village Kimbuva from the heap of wooden sticks. According to prosecution case, a preliminary panchnama was drawn in the presence of panchas and thereafter accused No.2 led them to the place of discovery. However, PW-6 Meruji Paragji Rajput did not support the prosecution case and panchnama and stated that he was called on Police Station, Patan, on 16th of March, 2000 and his signature was obtained on Exhibit-23. He was confronted with the panchnama at Exhibit-23. PW-7 Natvarlal Shivram Jadav, Executive Magistrate, is examined at Exhibit-26 and he arranged T.I. Parade, according to yadi of PI, Patan Taluka Police Station, on 16th of March, 2000 at 16.30 hours, in the presence of panchas, he arranged T.I. Parade and witnesses Shaileshbhai as well as Kamleshbhai, one by one, identified accused No.2 Musla Bhikhusha Hasamsha from line of persons, in which accused No.2 was standing, and he was identified by both the witnesses, as aforesaid. According to

this witness, he prepared a panchnama at Exhibit – 27. PW-8, Popatji Shivaji Rajput is examined at Exhibit – 29 and he stated that on 28th of August, 1999 he was In-charge PSO of Patan Taluka Police Station and at 21.10 hours from the Civil Hospital, he received one telephone message that in one quarrel, Patel Shailesbhai Babulal was injured and, therefore, the witness deputed Dhulabhai Ratnabhai to record the complaint of injured. Thereafter, Dhulabhai Ratnabhai recorded the complaint and produced before him, which he registered and investigation was handed over to PI Shri V.S. Dabhi. PW-9 Exhibit-34 Ramanlal Gopaldas Panchal is a panch of panchnama at Exhibit-35 in respect of the fact that accused No. 2 had led panchas and the police to the scene of offence. A preliminary panchnama was drawn because accused No.2 made disclosure statement to show place of offence. Latter part of panchnama was drawn at the place of offence as shown by the accused No.2. This panchnama - Exhibit-35 was drawn on 15.3.2000 between 19.15 hours to 20.30 hours. However, this witness has not supported the prosecution case nor panchnama at Exhibit – 35, instead, he stated that he was called on 15th of March, 2000 at Patan Taluka Police Station and his signature was obtained on ready panchnama. He denied all the other contents of the panchnama when confronted by learned APP to this panch. PW-10 Dhulabhai Ratnabhai Rabari is examined at Exhibit – 38. On 28th of August 1999 he was

serving as ASI of Patan Taluka Police Station and the then PSO deputed him to go to the Government Hospital and obtain the statement of injured Shailesh. Accordingly, he had been to the Government Hospital and recorded the complaint of injured Shailesbhai, who was in special ward. He thereafter presented the said complaint before PSO and during investigation he had arrested accused No.2 Musla Bhikhusha Hasamsha. This is all what he stated. He has not been cross-examined by the defence. PW-11 Dr. Kanubhai Mohanlal Patni is examined at Exhibit-39 and according to him he was on duty at Government Hospital, Patan, as Medical Officer. On 28th of August, 1999, at about 8.05 p.m. Shaileskumar Babulal Patel, was brought before him with police yadi. In history the injured stated that some unknown persons had caused him injuries while he was on motorcycle. He was semi conscious and had one incised wound on forehead, admeasuring 7.0 c.m. X 0.8 c.m. He was admitted to hospital as an indoor patient and was discharged on 4th of September, 1999. When he examined, the injury was fresh and could be caused by sharp cutting weapons. He produced on record the certificate issued at Exhibit – 40. PW-12 Shaileshkumar Babulal Patel is examined at Exhibit -41, injured witness, stated that the incident in question took place before five years at about 11.00 a.m. According to him, along with his brother Kamleshbhai, on bullet motorcycle, he had been to village Kimbuva and while he was returning

and his brother Kamleshbhai was driving the bullet motorcycle and he was sitting as pillion rider, some unknown persons had caused injuries to him by some unidentified weapon. He was injured on forehead and on account of this blow he had fallen down and had been unconscious. His brother had taken him to the government hospital at Patan and where he offered his complaint, which he produced at Exhibit-42. He stated that there were three persons, but he could not identify the person who had caused injuries to him. The injured witness therefore did not support the prosecution case and hence he was declared hostile. When confronted with his complaint, he denied the fact that he stated in the complaint that a dharia blow had given to him by accused No.1 and there were other two persons with accused No.1. He denied the fact that on account of compromise between the parties he was stating false facts. Thus, this injured witness has not supported the prosecution case. PW-13 Ashokbhai Himatlal Jardosh is examined at Exhibit-43. At relevant juncture on 15th of August 1999 he was working as PSI at Taluka Police Station, Patan, and he took charge of the investigation of this crime from Police Inspector Mr. P.S. Nayak. He arrested accused No.2. According to this witness, in fact, accused No.2 was arrested in some other crime where he gave information to the police that he was also accused of this case in which the incident had taken place on 28.8.1999. Accordingly, he draw the panchnama by which the

accused No.2 had shown the place of offence in the presence of panchas. He also had drawn the discovery panchnamas by which both the accused discovered the dharias in the presence of panchas. He had arranged test identification parade in respect of accused No. 2 and had submitted the charge sheet in the court of learned Magistrate. He has been cross-examined by the defence. Mostly, in cross-examination, denial and suggestions have been asked by the defence. PW-14 Virendrasinh Sujaji Dabhi, Exhibit-44, has been examined because he is the second Investigating Officer of this Crime. According to him, on 28th of August, 1999, he was serving in Taluka Police Station and was entrusted with the investigation of this crime. He draw the panchnama of scene of offence and collected control sample of the earth. He recorded the statements of the witnesses and draw the panchnama of motorcycle. He arrested accused No.1 and investigated about accused No.2, but he was absconding. He also draw the panchnama of blood stained clothes of complainant, which were sent to the Forensic Science Laboratory. In the meantime, he was transferred to civil defence and he transferred the investigation of this crime to PI Mr. Nayak of Patan City Police Station. He denied the allegations that he obtained signatures of panchas in all panchnamas and none of the panchnamas had been drawn as mentioned by him. PW-15 Kamleshbhai Babubhai Patel is examined at Exhibit-16 and he is the only eye witness

of the incident along with injured Shaileshbhai. According to him, on the day of incident, he had been to his agricultural land along with his brother at about 7.00 p.m. While they were returning on motorcycle and he was driving the motorcycle and his injured brother Shaileshbhai was sitting as a pillion rider, on road three persons attacked on them. In the said quarrel, his brother Shaileshbhai got injuries on his forehead. According to this witness, they could not identify the assailants. He stated that he could not say that whether those assailants were accused of the case. He denied of the knowledge that what was the cause of the dispute. He stated that the assailants were giving abuses. He stated that one stick blow was given to his brother on his forehead and thereafter his brother Shailesh was taken to the hospital where his brother gave a complaint before the police. The witness was declared hostile by the prosecution and he denied the fact that he stated before the police that on the day of the incident accused No.1 along with accused No.2 had attacked them and had caused injuries to this brother Shaileshbhai. Therefore, this witness also did not support the prosecution case.

6 Learned APP Mr. I.M. Pandya was heard on behalf of the State and he vehemently stated that the important witnesses of the case have though turned hostile and have not supported the prosecution case, but police witnesses who recorded the complaint and investigated

the offences have supported the prosecution case as well as the Executive Magistrate who conducted the identification parade has also supported the prosecution case and, therefore, the Appeal requires consideration.

7 This being an appeal against the acquittal, at this stage also, we have carefully gone through the record and proceedings and scanned the evidence recorded during trial. The Record and Proceedings called from the Trial Court was available with us and learned APP has assisted us to a greater extent with the copies of the evidence and the documents produced. We have appreciated the evidence as recorded by the Trial Court and has been noted, as aforesaid, in detail.

8 While scanning the evidence and appreciating the same, it clearly appears that injured witness Exhibit – 41 Shaileskumar Babulal Patel and his brother PW-15 Kamleshbhai Babulal Patel Exhibit – 46 have not supported the prosecution case. They have failed to establish the identity of assailants and, therefore, the prosecution could not be establish beyond doubt that accused No.1 caused injuries to injured Shaileshkumar Babulal Patel. Both of them stated that some unknown persons caused injuries to Shailesbhai. In addition to this, none of the panch witnesses have supported the prosecution case in respect of any of the panchnamas. Though two Investigating Officers are examined in the

case and those witnesses are PW-13 Ashokbhai Himattlal Jardosh and PW-14 Exhibit – 44 Virendrasinh Sujaji Dabhi, but none of the panchnamas could be proved even through their evidence also. There are two discovery panchnamas, by which it is alleged that both the accused discovered dharias from different places. On account of panchas not supporting the panchnamas and since panchnamas could not be probably proved through the Investigating Agencies, the fact of discovery also could not be proved beyond doubt by the prosecution. Then the third set of evidence against the accused No.2 is in respect of identification parade. Though the Executive Magistrate PW-7 Natvarlal Shivram Jadav at Exhibit- 26, deposed that he had arranged T.I. Parade on 16th of March, 2000 at 16.30 hours wherein both the witnesses i.e. injured and the complainant identified accused No.2 from the line of persons standing during test identification parade. He had drawn, according to him, the panchnama at Exhibit – 28. However, his evidence is not supported either by the panchas or by both the witnesses who identified accused No.2 . Panchas of panchnamas at Exhibit – 28 have not been examined by the prosecution and that none of the witnesses i.e. Shaileshbhai or Kamleshbhai stated in their depositions that accused No. 2 was identified by them in the said T.I. Parade and, therefore, this evidence is also of no avail to the prosecution case.

9 Appreciating therefore carefully the evidence of prosecution, it clearly appears that the direct evidence is not coming forward from the prosecution because injured complainant and his brother, eye witness both have not supported the prosecution case and they turned hostile. The second set of evidence by both the accused i.e. discovery of muddamal weapons i.e. dharias from each of the accused could not be proved by the prosecution beyond reasonable doubt, as stated above. Thirdly, the evidence of test identification parade in respect of accused No.2 is also not clinching to connect the accused No.2 with the crime for the reasons noted above. Thus, in our independent and dispassionate screening and appreciation of evidence, we also come to the conclusion that, the prosecution failed to prove the guilt of the accused beyond doubt. Therefore, the reasons assigned by the Trial Court for acquitting the accused requires no interference and even at this stage, it clearly appears that the judgment and order impugned in this Appeal is not subjected to any interference by this Court in an acquittal appeal. In this view of matter, the following order is passed.

"Leave to Appeal is refused. Appeal stands dismissed."

(J. R. VORA, J.) **(BANKIM N. METHA, J.)**

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